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IN THE

SUPREME COURT OF THE UNITED STATES.

RUSSELL V. WARNER and GEORGE H. TAMBLE, a Partnership, Doing Business as WARNER & TAMBLE TRANSPORTATION COMPANY,
Appellants,

vs.

UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION,
Appellees.

No. 641
OCTOBER TERM
1950

PETITION FOR REHEARING
Filed on Behalf of Appellants.

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PETITION FOR REHEARING

MAY IT PLEASE THE COURT:

Appellants are much aggrieved by the **per curiam** order of the Court entered in this cause granting motions to affirm, and respectfully petition the Court for rehearing in the sincere belief that, in equity and justice, they are entitled to the relief sought.

It is not the contention of appellants that the Court should weigh the evidence or substitute its judgment for The Interstate Commerce Commission on transportation

problems, nor pass on the correctness of the Commission's reasoning; appellants do urge, however, that it is the duty of and within the province of the Court to review the action of the Commission to determine whether the Commission has properly construed applicable legislation and applied correct legal principles, or whether the Commission has acted arbitrarily or unlawfully in promulgating the order under attack, as we feel has been done in this case.

Neither do appellants affirm that the Court should concern itself with administrative inconsistences, but they do urge that where such inconsistences exist, as is here the case, it is the duty of the Court to determine which of such inconsistent administrative positions reflect correct legal principles.

We feel that the **per curiam** order results, perhaps, from failure to specifically direct the attention of the Court to the "Statement Of Points Upon Which Appellants Intend To Rely," heretofore not printed, but attached hereto as "Appendix A." Appellants general "Statement as to Jurisdiction," heretofore printed, while, in our opinion establishing that substantial questions are involved, apparently did not sufficiently challenge the attention of the Court to the serious questions of statutory construction and application involved, particularly those which have not been presented to this Court prior to this appeal, and which, we submit, are not covered by the motions to affirm.

The orders of the Commission attacked are those made on applications by appellants for a permit as a contract carrier by water of a general class of commodities under the "grandfather clause" of part III of the Interstate

Commerce Act, hereinafter referred to as the Act [U. S. Code, title 49, sec. 909 (f)], and to have the transportation of logs and "equipment of contractors working on the river and levees" requiring the use of special equipment, declared exempt from regulation under the Act, the latter being filed under sec. 303 (e) of the Act [U. S. Code, title 49, sec. 903 (e)]. The reports preceding the order attacked are reported at 265 I.C.C. 147 and 265 I.C.C. 543; reference is also made to a report, partially printed, appearing at 250 I.C.C. 803.

The order attacked is that of the Commission dated May 17, 1949 in No. W-64 Warner & Tamble Contract Carrier Application. The order is not published but all pertinent parts thereof are quoted herein.

As is clearly established by the reports, **supra**, and more clearly by the record in this case, appellants, for more than twenty years prior to enactment of part III of the Act, held themselves out as being willing to perform, and did perform, a call and demand contract-carrier water transportation service for all who had need therefor, without restriction as to territory, commodity transported, or ownership thereof, use to which such commodity was to be put or site of such use, and irrespective of the business in which appellants' customer was engaged. The service offered and performed included not only freighting and towing by the use of self-propelled vessels and non-self-propelled vessels with self-propelled vessels attached, but also the furnishing of non-self-propelled vessels and of self-propelled vessels with non-self-propelled vessels attached, under charter, lease or other arrangement, on both bare-boat and fully-found bases.

The thesis of this petition for rehearing is that by the highly restrictive order of the Commission appellants are deprived of rights to which they are entitled under sec. 309 (f) of the Act, that substantial parity between future and past **bona fide** operations cannot be maintained, and that such order results from arbitrary and unlawful construction and application of the Act and controlling legal principles.

THE FURNISHING OF SELF-PROPELLED VESSELS

Here is presented a substantial question not covered by the motions to dismiss nor, insofar as we have been able to ascertain, heretofore considered by the Court.

The Commission has correctly found that appellants are properly designated as a contract as distinguished from a common carrier by water. Sec. 302 (e) of the Act [U. S. Code, title 49, sec. 902 (e)], insofar as here pertinent, provides:

> "(e) the term 'contract carrier by water' means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (d) and the exception therein) by water of passengers or property in interstate or foreign commerce for compensation.
>
> "The furnishing for compensation **(under a charter, lease, or other agreement)** of a vessel, to a person other than a carrier subject to this act, to be used by the person to whom such vessel is furnished in the transportation of its own property, shall be considered to constitute, as to the vessel so furnished, engaging in transportation for compensation by the person furnishing such vessel, within the meaning of the foregoing definition of 'contract carrier by water.' " (Emphasis, but not parenthesis, supplied.)

By elision of "lease or other agreement" from the statute, insofar as self-propelled vessels are concerned, the Commission has arbitrarily and unlawfully deprived appellants of the right to continue to furnish self-propelled vessels.[1]

We advisedly state that, insofar as self-propelled vessels are concerned, the Commission has unlawfully elided "lease or other agreement" from the Act inasmuch, as we will demonstrate, no consideration whatsoever has been given thereto by the Commission.

At 265 I.C.C. 543, 544-546, under the heading "Chartering" the Commission makes its findings with respect to past **bona fide** operations of appellants in the furnishing of self-propelled vessels. Therefrom it is obvious that such service constituted a major portion of appellants' operation, and that approximately fifty per-cent of such service was the furnishing of self-propelled vessels on a fully-found basis to the Memphis District Office of the United States Engineers. Reference to Exhibits 33 and 39, up on appeal in their original form, will establish that gen-

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[1] The final order of the Commission, dated May 17, 1949, provides: "It is ordered, that applicants be, and they are hereby, authorized to continue operations as a contract carrier by water, in interstate or foreign commerce, (1) by non-self-propelled vessels with the use of separate towing vessels in the transportation of forest products, between ports and points along the Mississippi River and its tributaries (not including the Ohio River or the Gulf Intracoastal Waterway) below and including Cairo, Illinois, (2) by towing vessels in the performance of general towage between points along the Mississippi River and its tributaries (not including the Ohio River above Paducah, Kentucky, or the Gulf Intracoastal Waterway) below and including Cairo, and (3) at Memphis, Tennessee, in the furnishing for compensation under charter, lease or other agreement of non-self-propelled vessels to persons other than carriers subject to the Act, to be used by such persons for the transportation of their own property." (Emphasis supplied.)

erally such furnishing was for extended periods of time, running to several months duration.[2]

A typical contract for vessel-furnishing between appellants and the United States Engineers is attached as Appendix "B."

The Commission has denied to appellants the right to furnish self-propelled vessels in the future, after finding facts establishing past **bona fide** operation in the furnishing thereof during the critical period, solely upon the basis of its finding that the vessel-furnishing by appellants was not by "charter" within the meaning of sec. 302 (e) of the Act, and that the only reason the furnishing was found not to be by "charter" was that the definition of a "demise," as such term had been defined by the Commission in **Barrett Line, Inc., Contract Carrier Application**, 265 I.C.C. 361, had not been met. See 265 I.C.C. 543, 544-545.

We respectfully present that, it being admitted appellants had been engaged in **bona fide** operation in the furnishing of self-propelled vessels during the critical period, **it is utterly immaterial whether such furnishing was under "charter," as administratively defined, or whether such furnishing was under "lease or other agreement."**

The conclusion is inescapable that Congress had in contemplation vessel-furnishing other than that coming within

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[2] We pass over the question whether, with respect to appellants' right to furnish self-propelled vessels on a bare-boat basis the Commission may lawfully exclude from consideration all instances thereof where such vessels were furnished prior to the critical date to carriers now subject to the Act, and whether the Commission may lawfully fail to take cognizance of the limited opportunity for such furnishing to other persons, and here present the question as to legality of the Commission's order solely on the basis of the furnishing of self-propelled vessels on a fully-found basis to the United States Engineers. (265 I.C.C. 543, 545.)

any conceivable administrative definition of "charter" when it specifically recognized that vessels could also be furnished under **"lease, or other agreement,"** and that by parenthetically providing for all such types of vessel-furnishing the Congress **emphasized its intent** that to the **full extent** and **in the manner** that a carrier had been engaged in **bona fide** operation in furnishing vessels prior to the critical date and during the critical period, **in that manner and to that extent,** it was entitled to continue to furnish such vessels upon application for such permit being duly filed, **regardless of by what name the vessel-furnishing had been or was to be called.**

We respectfully present that the **per curiam** order has **failed to take into consideration** the foregoing substantial **question and that** the petition for rehearing should be **granted.**

There are additional substantial questions in this connection heretofore not passed upon by this Court, i.e., whether the Commission correctly construes sec. 302 (e) of the Act to mean that there can be no "charter" unless there is a "demise," as such term is defined by the Commission, as well as legality of the definition of "demise" promulgated by the Commission. See **Barrett Line, Inc., Contract Carrier Application,** 265 I.C.C. 361, 368; **Warner & Tamble, Contract Carrier Application,** 265 I.C.C. 543, 545.

THE EXEMPTION

The Court, we respectfully present, has failed to take into consideration the fact that the Commission has arbitrarily and unlawfully attempted to grant an exemption[3] under sec. 303 (e) of the Act[4] greater in scope than applied for by the carrier, and for the transportation of commodities other than those which by their inherent nature require use of special equipment, and has arbitrarily and unlawfully used such exemption as the basis for refusing to appellants a permit as a contract carrier by water to which they are entitled as a matter of presumptive right under sec. 309 (f) of the Act.

On May 9, 1942, pursuant to application for exemption filed by applicants on December 30, 1940, under sec. 303 (e) of the Act to have its transportation of logs and equipment of contractors working on the river and levees, requiring the use of special equipment, declared exempt, the Commission issued a report and order (complete copy in evidence, partially reported 250 I.C.C. 803), finding

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[3] The exemption as it appears in the order of May 17, 1949, is as follows: "It is further ordered, that until further order of the Commission, transportation engaged in by applicants as a contract carrier by water of contractors' equipment, and materials and supplies incidental to and used with contractors' equipment, employed in construction work on the Mississippi River and its tributaries, and at points along such waterways, be, and it is hereby, exempted from the provisions of part III of the Act."

[4] Sec. 303 (e) of the Act provides: "It is hereby declared to be the policy of Congress to exclude from the provisions of this part, in addition to the transportation otherwise excluded under this section, transportation by **contract carriers** by water which, by reason of the **inherent nature** of the commodities transported, their **requirement of special equipment**, or their shipment in bulk, is not actually and substantially competitive with transportation by any **common carrier** subject to this part or Part I or Part II. **Upon application of a carrier**, made in such **manner and form as the Commission may by regulations prescribe, the Commission shall, subject to such reasonable conditions and limitations as the Commission may prescribe, by order exempt from the provisions of this part such of the transportation engaged in by such carrier as it find necessary to carry out the policy above declared.**" (Emphasis supplied.)

applicant's transportation of "contractors' equipment used in making levees or digging cut-offs" in that such transportation required the use of special equipment, exempt from regulation. The report stated, further:

> "The findings herein are **without prejudice** to whatever conclusions may be warranted on the **application for a permit** which applicants filed subsequent to this application for exemption." (Emphasis supplied.)

The exemption application filed on December 30, 1940, was the only such application ever filed; it was never amended; the report and order thereon issued on May 9, 1942, were not excepted to by appellants, after their application for a contract carrier permit had been filed and was in process, because appellants relied upon the above-quoted portion thereof which stated that same was **without prejudice to the permit application.** In this appellants have been misled. It is clear from the reports of the Commission in 265 I.C.C. 147 and 543, as well as from the motions to affirm herein filed, that the only basis for denial of appellants application for a permit to perform a freighting service in transporting a general class of commodities or, except for forest products, the specific commodities transported during the critical period, is the fact that an exemption is granted to transport, within a limited area and for limited use "contractors' equipment, and materials and supplies incidental to and used with contractors' equipment."

The Commission acknowledges, 265 I.C.C. at page 549, that the evidence adduced on behalf of appellants indicates transportation of "a wide range of commodities," including cattle, dredging equipment, rice, logs, lumber, piling, gasoline and other petroleum products, steel

and steel bars, machinery, derricks, dredges, household furniture, mules, drag lines, tractors, bulldozers, camp equipment, trucks, repair parts, houses, tools, greases, oils, air compressors, welding machines, greasing equipment and stoves. And, if oral evidence had been given credence, to this list would have been added saw mill equipment, dummy railroads, mixed concrete in slabs, fabric, reinforcement steel, sand and gravel, cement in sacks, roofing gravel, torpedo sand, standard and birds-eye gravel, Class 1 gravel, coal and cement in bulk. (Tr. pp. 147, pp. 151, **et seq.**, pp. 164 **et seq.**)

This feature of the petition for rehearing has two bases, both presenting legal questions heretofore not determined by this Court, i.e., first, whether the Commission may lawfully force a carrier to accept an exemption under sec. 303 (e) of the Act in lieu of a permit to which it is entitled as a matter of presumptive right under sec. 309 (f) thereof and, second, whether the Commission has exceeded the scope of its authority in issuing the particular exemption involved in this case.

With respect to the first question, the language of sec. 309 (f) of the Act is mandatory—thereby the Congress provided that, the criteria set forth therein being met, "**. . . . . the Commission shall issue such permit, without further proceedings . . . .**" (Emphasis supplied.) There is no limitation on this express command nor any proviso thereto, and neither is any discretion vested in the Commission.

The permit provided by sec. 309 (f) of the Act is an affirmative right of material value, affording the holder thereof protection from encroachment by either another common or contract carrier in the absence of proof of

public convenience and necessity requiring the competitive operation; specific provision is made in sec. 312 of the Act for the sale and transfer of the property right evidenced by the contract carrier's permit; permits granted under sec. 309 (f) are permanent and not subject to cancellation so long as the carrier complies with applicable laws and regulations.

On the other hand, an exemption granted under sec. 303 (e) of the Act is merely a negative status; no provision is made in the Act for the sale or transfer of an exemption; it cannot ripen into a permit except by legislative action or order of the Commission, and there is no provision whereby a carrier may require the Commission to take any action with respect there to [see sec. 303 (L)]; the basis for the exemption is a finding that the transportation performed thereunder is not competitive with transportation performed by any **common carrier** subject to parts I, II or III of the Act. [sec. 303 (e)]—and no protection is afforded from competition by other **contract carriers**, who, wishing to perform the same type transportation here held to be noncompetitive with common carriers, would be equally entitled to have such transportation declared exempt, and to perform a new competitive service without proof of public convenience and necessity.

With respect to the second question, under sec. 303 (e) the Commission is empowered to grant exemption **only** upon application of a carrier and then **only** with respect to commodities which, by reason of their inherent nature, their shipment in bulk, or their requirement of special equipment are not competitive, as aforesaid. [sec. 303 (e)].

The reports upon which the exemption order are based, 265 I.C.C. pp. 147 **et seq.**, pp. 543 **et seq.**, make no finding with respect to the inherent nature of the commodities and such is not mentioned by the exemption order quoted, **supra**, nor does the order make any reference to requirement of special equipment or transportation in bulk. The order clearly, therefore, exceeds the authority of the Commission in these respects. If the case is closed at this point appellants in attempting to operate under the exemption apparently would be vulnerable to injunctive action by competitors or complaint proceedings before the Commission.

In the next place, the exemption order is broader in scope than the application upon which it is based, and nowhere in the Act do we find any authority for the Commission to grant an exemption greater in scope than applied for by the carrier.

The statement in the report, 265 I.C.C. 543, 551 that "It was upon applicants' initiative that the exemption was granted by us" is misleading. Admittedly on December 30, 1940, appellants filed application for a limited exemption, and accepted the order of the Commission dated May 9, 1942, granting exemption for the transportation of "contractors' equipment used in making levees or digging cutoffs," upon the Commission's assurance that such would not prejudice their permit application. No petition for reopening or amendment of the original exemption application or order has been made or filed by appellants, and the reopening and enlargement of the exemption has been of the Commission's own motion. In the exemption, as granted by the order of May 17, 1949, the commodity description is substantially enlarged and the restriction that the exemption applied only to equipment "used in making

levees or digging cut-offs" is removed. Enlargement of the one and removal of the other have the same practical effect—to substitute an exemption for a permit.

The statement at 265 I.C.C. 543, 551 with respect to appellants' argument, and that we seek to have the Commission set up a straw man in order to knock him down is simply a misconstruction or misunderstanding of appellants' position as set forth above.

We respectfully present, therefore, that the Court should rehear on the exemption issue and hold that the Commission cannot force a carrier to accept an exemption in lieu of a permit to which it is presumptively entitled, and that the Commission has unlawfully exceeded the scope of its authority as to the exemption granted herein.

THE COMMISSION'S ORDER RESULTS FROM APPLICATION OF ERRONEOUS STANDARDS

In **Alton R. R. Company vs. United States,** 315 U. S. 15, **Barrett Line, Inc., vs. United States, et al,** 326 U. S. 179 and **United States Vs. Carolina Freight Carriers Corporation,** 315 U. S. 475, in the latter two of which cases the Court apparently adopts the principles enunciated by the Commission in **C. F. Harms Company, Contract Carrier Application,** 260 I.C.C. 171, **Russell Brothers Towing Case,** 250 I.C.C. 429, and **Moran Towing and Transportation Company Case** 250 I.C.C. 541, 260 I.C.C. 269, there have been set forth the legal principles which are controlling in proceedings before the Commission such as that here involved.

The principles applied by the Commission in this case do violence to its previous decisions as well as to the

decisions of this Court, as a result of which appellants respectfully present that their petition to rehear should be granted and that the Court should assume jurisdiction and determine that the Commission has unlawfully strictly rather than liberally construed the Act; and that the Commission has unlawfully failed to view appellants' operation as a whole, and thereby, as well as by adopting a system of atomization, molecularization, and pulverization frozen appellants' future operations into even less than the precise pattern of past operations, and prevented substantial parity between past bona fide operations and future operations; and judicially establish whether the Commission may lawfully apply different standards in determining the rights of contract as distinguished from common carriers by water to transport a general class of commodities; and determine whether the Commission may lawfully, as is here done, exclude from consideration under a "grandfather clause" application all evidence of transportation performed which at this time, either by legislative enactment, general or special administrative edict, is temporarily or permanently excluded from regulation, as well as oral evidence of transportation performed.

Appellants respectfully show to the Court that the Commission has acted arbitrarily and unlawfully in each of the foregoing respects; that when the reports of the Commission in 265 I.C.C. 147 and 543 are carefully examined it will be disclosed that throughout the critical period appellants were performing a wide variety of services and transporting a wide range of commodities over an extensive territory. Admittedly all types services were not being performed at the same time, and admittedly operations were not being conducted in all segments of the territory at the same time. Such method of operation is an inherent feature of contract water carrier service.

The order of the Commission attacked effectively precludes appellants from continuing to operate in the future as they have held themselves out as being willing to operate and operated in the past, either as to type service, territory, or commodities to be transported under the limited permit granted, the alleged exemption granted, or by combination thereof.

In the face of the evidence of past extensive operations performed appellants have been granted a permit to operate as a contract carrier commodity-wise only in the transportation of forest products; the wide range of general commodities transported has been reduced to and included in the generic term "contractors' equipment, etc." contained in an exemption limiting transportation thereof as to ownership, use to which the commodities are to be put and site of such use; territorially both permit and exempt operations have been greatly restricted as to commodity and service; and appellants have been precluded from furnishing fully-found self-propelled vessels under charter, lease or other agreement.

To aid the Court in visualizing the vast difference between past bona fide operations and those permitted by the order attacked we have prepared and attach as Appendix "C" a tabulation showing the requested authority which we earnestly insist should have been granted to appellants if the Commission had properly construed the Act and applied correct legal principles to the evidence adduced of record, the permit authority granted, the permit authority denied by the order, and the transportation which may be performed under the exemption. This tabulation we present, conclusively establishes that there can be no substantial parity between future and past bona fide operations.

WHEREFORE, premises considered, appellants respectfully petition the Court to rehear the motions to affirm and assume jurisdiction in order that appellants may fully demonstrate to the Court the error of the Court below in affirming the order of the Interstate Commerce Commission involved in this case.

Respectfully submitted,

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APPENDIX "A"

STATEMENT OF POINTS UPON WHICH APPELLANTS INTEND TO RELY.

Pursuant to the provisions of paragraph 9 of Rule 13 of the Revised Rules of the Supreme Court, appellants intend to rely on the points that the district court erred as a matter of law in affirming and in not setting aside and enjoining enforcement of an order of The Interstate Commerce Commission (order of May 17, 1949, as amended and corrected, in I.C.C. Docket No. W-64) issued on applications filed by appellants under secs. 303 (e) and 309 (f) of Part III of the Interstate Commerce Act, U. S. Code, title 49, secs. 903 (e) and 909 (f) and in approving action of the Commission with respect thereto, in that the action of the Commission and its order aforesaid are arbitrary and unlawful, result from misconstruction and misapplication of Part III of The Interstate Commerce Act (54 Stat. L. 929, U. S. Code, title 49, secs. 902 et seq.)*, and exceed the scope of the Commission's authority in the following respects:

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1. In holding that an applicant for a "grandfather clause" permit as a contract carrier by water, to furnish self-propelled vessels under secs. 302 (e) and 309 (f) of the Act, is entitled to a permit only to the extent that **bona fide** operations during the critical period were engaged in by applicant in the "chartering" of vessels, as such term has recently been defined by the Commission, and in holding that there can be no "charter" without a "demise," also as such term has recently been defined by the Com-

*Hereinafter referred to as the Commission and the Act.

mission; in holding that an "affreightment charter" is not contemplated by the Act; and in refusing to grant a permit for the furnishing of vessels "under . . . **lease, or other agreement**" (sec. 302 (e) of the Act) solely upon the basis of a finding that vessel-furnishing by appellants did not meet the Commission's definition of "demise."

2. In refusing to hold that upon the basis of the facts as found, appellants, during the critical period, had been engaged in **bona fide** operation as a contract carrier in the furnishing of self-propelled vessels under charter, lease, or other agreement.

3. The Commission may not lawfully force an applicant for a permit as a contract carrier by water under sec. 309 (f) of the Act to accept, in lieu thereof, a temporary exemption under sec. 303 (e), nor deny a permit to which the carrier is otherwise entitled under the former section because of grant of such an exemption under the latter, nor lawfully grant an exemption under sec. 303 (e) greater in scope than applied for by the carrier, nor lawfully grant an exemption under sec. 303 (e) for the transportation of commodities other than those which by their inherent nature require use of special equipment.

4. On an application under the "grandfather clause" of Part III of the Act (sec. 309 (f)) the Commission may not lawfully atomize, molecularize and pulverize prior operations of a contract water carrier, as has here arbitrarily been done, in that the Commission segregated prior **bona fide** transportation performed by the carrier, first, into limited periods of time; second, territorially within such periods of time; third, by commodities within such territories and within such periods of time; fourth, by type of

transportation performed within such periods of time, territorially, and commodity-wise, and fifth as to class of persons for which such services were performed.

5. On a contract carrier application under the "grandfather clause" of Part III of the Act, **supra**, the Commission may not lawfully strictly construe and apply the Act, the "grandfather clause" being remedial and to be liberally construed, nor may the Commission lawfully restrict a permit granted thereunder in such manner as to effectively freeze the carrier's future operations into the precise pattern, or less than the precise pattern, of past **bona fide** operations, nor may the Commission lawfully refuse to grant a permit which will permit the maintenance of substantial parity between future operations and past **bona fide** operations, all as has arbitrarily and unlawfully been done in this case.

6. The Commission may not lawfully apply different standards and principles in determining past **bona fide** operations of an applicant for a permit as a **contract water carrier** under sec. 309 (f) of the Act, as distinguished from an applicant for a certificate as a **common carrier** by water under sec. 309 (a) of the Act.

7. Where an applicant is found to have been engaged in **bona fide** operation as a contract carrier by water in the transportation of a wide range of commodities, holding itself out as being willing to perform and performing such transportation without limitation as to ownership thereof, use to which same were to be put, or point at which to be used, the Commission may not lawfully group all such commodities under the generic term "contractors' equipment, and materials and supplies incidental to and used

with contractors' equipment," with further restrictive limitation as to use to which such commodities are to be put and place of use thereof, and thereby deprive the carrier of a permit to which it is entitled to transport commodities generally.

8. In determining prior **bona fide** operations of a contract carrier by water seeking authority under the "grandfather clause" of the Act (sec. 309 (f)) the Commission may not lawfully fail and refuse to consider evidence of the carrier's operations as a whole, as well as **bona fide** holding out by the carrier of willingness and ability to perform transportation without restriction, and neither may the Commission lawfully exclude from consideration evidence of transportation which by said Act was subsequently declared exempt from future regulation, nor **bona fide** transportation performed which was subsequently declared exempt by general or specific administrative order or edict, nor transportation intrastate in character, nor transportation performed proof of which was limited to oral testimony.

APPENDIX "B"

As Exhibit No. 40, up on appeal in its original form, is a typical agreement between appellants and the United States Engineers, which agreement provides:

> "For rental of Diesel boat 'Mary Elizabeth,' for approximately 30 days beginning 16 August 1946 in accordance with the following specifications: (24 hour day) 30 days, $225.00 per 24 hour day. Payment will be computed starting from the day and hour of delivery of the towboat to the contracting officer and ending when the towboat is returned to the contractor at Memphis, Tennessee, or some other point equally agreeable to the contracting party on the basis of days and fractions thereof, the towboat to be in possession of the government. Time will be calculated to the nearest 1/4 hour for payment. The towboat shall be operated as directed by the contracting officer or his authorized representative, except that the master thereof shall not be expected to operate the towboat in any manner which would, in his opinion, endanger the towboat, the barges in tow, or the cargo. The contractor or his representative with full authority to act for him with reference to the care and operation of the plant shall be on the plant at all times. The contractor shall furnish at his own expense all labor, appliances, equipment, materials, subsistence and supplies and shall bear all expenses incidental to the efficient operation of the plant in connection with the work of towing under the contract. Contractor shall also bear all direct overhead and current expenses incidental to the operation upkeep, and repair of the plant, he shall maintain the plant in good state of repair, shall arrange for a supply of renewal parts to

be on hand when needed, and shall provide and maintain efficient crews. It is understood that the contractor releases the government and its officers and agents from all responsibility for damage such as are ordinarily covered by a fire and marine insurance."

APPENDIX "C"

PLAINTIFF IS ENTITLED, AS A MATTER OR PRESUMPTIVE RIGHT, TO A PERMIT, AS A CONTRACT CARRIER BY WATER, TO ENGAGE IN THE FOLLOWING OPERATIONS:

(1) By non-self-propelled vessels with the use of separate towing vessels, in the transportation of a general class of commodities, upon the Gulf Intracoastal Waterway, between ports and points along the Illinois waterway and the Mississippi river and its tributaries, except the Mississippi river above its confluence with the Illinois Waterway.

(2) By towing vessels in the performance of general towage between points and places along the aforedescribed waterways, and

(3) At Memphis, Tennessee, in the furnishing for compensation (under charter, lease, or other agreement) of self-propelled and non-self-propelled vessels to persons other than carriers subject to the Act, to be used by such persons for the transportation of their own property.

THE INTERSTATE COMMERCE COMMISSION HAS ERRONEOUSLY HELD THAT PLAINTIFF, AS A CONTRACT CARRIER, IS ONLY AUTHORIZED TO CONTINUE OPERATIONS:

(1) By non-self propelled vessels, with the use of separate towing vessels, in the transportation of forest products, between ports and points along the Mississippi River and its tributaries (not including the Ohio River or the Gulf intracoastal waterway) below and including Cairo, Illinois.

(2) By towing vessels in the performance of general

towage between points along the Mississippi River and its tributaries (not including the Ohio River above Paducah, Kentucky, or the Gulf intracoastal waterway) below and including Cairo, and

(3) At Memphis, Tennessee, in the furnishing for compensation (under charter, lease or other agreement) of non-self-propelled vessels to persons other than carriers subject to the act, to be used by such persons for the transportation of their own property.

THE INTERSTATE COMMERCE COMMISSION HAS UNLAWFULLY REFUSED TO RECOGNIZE PLAINTIFF'S PRESUMPTIVE RIGHT TO CONTINUE TO ENGAGE:

(a) In the transportation of a general class of commodities on the Illinois waterway and on the Ohio River, the Mississippi and the Gulf Intracoastsal Waterway.

(b) By towing vessels in the performance of general towage on the Illinois waterway, the Ohio River above Paducah, Kentucky, and on the Mississippi River above Cairo, Illinois, and

(c) In the furnishing for compensation (under charter, lease or other agreement) of self-propelled vessels to persons other than carriers subject to the Act, to be used by such persons for the transportation of their own property.

IN ADDITION TO THE OPERATIONS AUTHORIZED, AS ABOVE, THE COMMISSION PROVIDED AN EXEMPTION "UNTIL THE FURTHER ORDER OF THE COMMISSION" FOR:

> "Transportation engaged in by applicant as a contract carrier by water, of contractors' equipment, and materials and supplies incidental to and used with contractors' equipment, employed in construction work on the Mississippi River and its tributaries and at points along such waterways, be, and it is hereby, exempted from the provisions of Part III of the Act."